

IN THE SUPREME COURT OF FLORIDA

ANTONIO GARRETT,

Petitioner,

v.

CASE NO. SC14-2110

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

INITIAL MERITS BRIEF OF PETITIONER

NANCY A. DANIELS
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SECOND JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

The state charged Garrett by indictment with first-degree murder and possession of a firearm by a convicted felon, allegedly committed September 3, 2011. (R1.24) Rather than litigate his immunity from the murder charge before trial under sections 776.012(1) or 776.013(3), Florida Statutes, Garrett opted to place his defense of justifiable use of deadly force before a jury of his peers.

After the state introduced evidence that Garrett acted in self-defense, both the state and defense presented proposed instructions on the justifiable use of deadly force. (R7.525)¹ The prosecutor did not object to defense counsel's version, but asked to add a statement that possession of a firearm by a convicted felon constitutes unlawful activity. (R7.534-35) Defense counsel objected on grounds that although decision cited by the state for the request, Dorsey v. State, 74 So. 3d 521 (Fla. 4th DCA 2011) (Dorsey I), held that the common-law duty to retreat applies to a defendant in possession of a firearm by a convicted felon, Dorsey I did not approve an instruction so stating. (R7.537, 544) The court overruled the objection. The court instructed the jury as follows:

An issue in this case is whether Antonio Garrett acted in self-defense. It is a defense to the offense with which Antonio Garrett is charged and all lesser included

1. In this brief, the record on appeal is cited by volume number, preceded by "R."

offenses if the death of or injury to Jerry Ford resulted from the justifiable use of deadly force.

“Deadly force” means force likely to cause death or great bodily harm.

The use of deadly force is justifiable only if Antonio Garrett reasonably believes that the force is necessary to prevent imminent death or great bodily harm to himself while resisting another’s attempt to commit Attempted Murder in the Second Degree and/or aggravated battery.

...

A person is justified in using deadly force if he reasonably believes that such force is necessary to prevent:

1. imminent death or great bodily harm to himself or another, or
2. the imminent commission of Attempted Murder in the Second Degree and/or Aggravated Battery, against himself or another.

In deciding whether Antonio Garrett was justified in the use of deadly force, you must judge him by the circumstances by which he was surrounded at the time the force was used. The danger facing Antonio Garrett need not have been actual; however, to justify the use of deadly force, the appearance of danger must have been so real that a reasonably cautious and prudent person under the same circumstances would have believed that the danger could be avoided only through the use of that force. Based upon appearances, Antonio Garrett must have actually believed that the danger was real.

If Antonio Garrett was not engaged in an unlawful activity and was attacked in any place where he had a right to be, he had no duty to retreat and had the right to stand his ground and meet force with force, including deadly force, if he reasonably believed that it was necessary to do so to prevent death or great bodily harm to himself or to prevent the commission of a forcible felony.

(R8.613-15)

The court then told the jurors to consider whether Garrett had a duty to retreat if they found he was engaged in unlawful activity:

However, if you find that Antonio Garrett was engaging in unlawful activity then you must consider if Antonio Garrett had a duty to retreat.

Antonio Garrett cannot justify the use of force likely to cause death or great bodily harm unless he used every available means within his power and consistent with his own safety to avoid the danger before resorting to that force. The fact that Antonio Garrett was wrongfully attacked cannot justify his use of force likely to cause death or great bodily harm if, by retreating, he could have avoided the use of that force. However, if Antonio Garrett was placed in a position of imminent danger of death or great bodily harm and it would have increased his own danger to retreat then his use of force likely to cause death or great bodily harm was justifiable.

Possession of a firearm by a convicted felon constitutes unlawful activity.

(R8.615-616).

The jury found Garrett guilty of first-degree, premeditated murder as charged. (R1.90-91, R7.604-06) In a separate proceeding, the same jury received evidence on Garrett's prior felony convictions and then found him guilty of possession of a firearm by a convicted felon. (R7.655) The court adjudicated him guilty and sentenced him to concurrent prison terms of life and 15 years in prison. (R1.128-35).

On appeal, Garrett argued that the trial court erred in telling jurors, as part of the “stand your ground” instruction, that possession of a firearm by a convicted is unlawful activity. The First District Court of Appeal agreed that the instruction should not have been given, but concluded that the error was neither fundamental error nor preserved by a sufficiently specific objection. Garrett v. State, 148 So. 3d 466 (Fla. 1st DCA 2014). This Court exercised jurisdiction to resolve interdistrict conflict with Dorsey v. State, 149 So. 3d 144 (Fla. 4th DCA 2011) (Dorsey II), and Rios v. State, 143 So. 3d 1167 (Fla. 4th DCA 2014).

STATEMENT OF THE FACTS

Melissa Summers and Jerry Ford lived together at 2316 Moncrief Road in the right side of a duplex in which the left half was vacant. (R6.234-35) Ruth Brown lived in the right half of the neighboring duplex, with the left half of that building also unoccupied. (R6.237) Brown hosted a party on the afternoon and evening of September 2, 2011. (R6.238-39) Summers attended the party and remained until midnight. Ford made several appearances at the party, where he had a “couple of beers and some drinks,” according to witness Onell Herrin. (R6.274) Ford then returned to the porch of his apartment, where he sat and drank from his own supply. (R6. 246)

Garrett was also present intermittently throughout the day. Garrett, who was homeless, told police he sometimes slept in the vacant apartment on the left side of the building where Ford and Summers lived. (R7.442) On the day of the party on September 2, Garrett was on the porch of that unit talking with another man. (R7.439) Summers saw Ford and Garrett talking as well. (R6.241) The man visiting with Garrett urinated in the front yard of the building, angering Ford. (R6.267, 7.441-43) Ford confronted Garrett about the other man’s actions. Garrett told police he tried to get Ford to back off, and that he left several times but

returned because he was residing on the property. (R6.439-41) Ford persisted, putting his hands in Garrett's face and spitting on him. (R6.441)

Summers testified that after she returned home from Ruth Brown's party, she saw a confrontation in which Ford pushed Garrett. (R6.248) Summers tried to intervene, but Ford told her to get into the house and be quiet (R6.248) Shortly after she went inside, Summers heard the gunshots that killed Ford. (R6.242)

Garrett told police that during their final confrontation, Ford went into the house and emerged with a .22-caliber long rifle. (R7.446) Ford pointed the gun at Garrett, who was standing on the sidewalk close to the porch. (R7.448) Garrett pulled a handgun from his pocket. (R7.447) Ford started to run back up his porch while cocking the rifle. Garrett fired as Ford ascended the steps. He continued to fire as Ford dropped the rifle. (R7.450) Garrett thought he fired seven or eight shots and that at least one struck Ford, in the back. (R7.450-53)

Witnesses Herrin and Anthony Kimble saw Garrett approach on the sidewalk and stop in front of Ford's gate. (R6.258-59, 277-78) Kimble said he did not see anything in Ford's hands when Garrett shot him. (R6.259) Afterward, Garrett walked back down the street and said, "I told you about fucking with me." (R6.261, 279)

Ford suffered three gunshot wounds, all back to front: in the leg, in the buttocks, and in the torso. The shot to the torso was fatal. (R6.327-36) He had

alcohol, cocaine, and metabolites of both in his system. (R6.339-41) Police found a .22-caliber rifle and BB gun leaning on the fence of Ford's yard. (R6.303, 360) Police found no ammunition for the .22 rifle.

Garrett led officers to an abandoned residence and showed them where he had hidden the gun, a .45-caliber semiautomatic pistol. (R7.483-508) The gun was identified as the source of cartridge casings on the sidewalk and bullets on the porch of Ford's residence. (R7.510-15)

The parties stipulated that Garrett had six previous felony convictions. (R7.482).

SUMMARY OF THE ARGUMENT

In Rios v. State, 143 So. 3d 1167 (Fla. 4th DCA 2014), and Dorsey v. State, 149 So. 3d 144 (Fla. 4th DCA 2014) (Dorsey II), the Fourth DCA concluded that fundamental error resulted from an erroneous jury instruction that a person engaged in illegal activity had a duty to retreat before meeting deadly force with deadly force under the “stand your ground” law in effect before 2014. Here, the First DCA concluded that the error did not affect the verdict because the jury would have had to find that Garrett faced a threat of imminent deadly violence “irrespective of the duty to retreat.” In so holding, the First DCA decided on its own that the state disproved self-defense beyond a reasonable doubt, contrary to Rios and Dorsey II. Its decision usurps the role of the jury on facts that could have yielded reasonable doubt on whether Garrett acted in lawful self-defense. Rios and Dorsey II better protect defendants’ right to stand their ground under section 776.012(1), Florida Statutes (2011).

The First DCA also strayed from this Court’s test for fundamental error in jury instructions on affirmative defenses. Rather than determine whether the instruction pertained to a theory of defense that is “extraordinarily weak,” Martinez v. State, 981 So. 2d 449, 455-56 (Fla. 2008), the court assessed whether the jury,

considering both the correct and improper instructions on self-defense, would still have found Garrett guilty.

In addition, the First DCA's reasoning conflated the instructions on use of deadly force to meet a threat of imminent deadly force when the defendant is and is not engaged in illegal activity. The instruction that illegal activity created a duty to retreat negated Garrett's right under section 776.012(1), Florida Statutes (2011), to stand his ground without retreating, regardless of whether he was acting illegally.

This Court should reject the First DCA's assumption of the jury's role, incorrect fundamental error analysis, and flawed reasoning. Like Rios and Dorsey, Garrett is entitled to a new trial before a jury that is not instructed that he was engaged in unlawful activity and therefore had a duty to retreat.

ARGUMENT

In a first-degree murder case arising before 2014 amendment to the “Stand Your Ground” law, the lower court wrongly ruled that an erroneous instruction that the defendant had a duty to retreat because he was engaged in illegal activity did not constitute fundamental error.

Standard of review: This Court’s resolution of interdistrict conflict on a claim of error in a jury instruction requires legal determinations based on established facts. Review is de novo.

Discussion: In one of the changes to the self-defense laws enacted in 2005, section 776.012(1), Florida Statutes, provides that a person is justified in using deadly force if “[h]e or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or to prevent the imminent commission of a forcible felony.” The provision remained in effect until amended effective June 20, 2014. See Ch. 2014-195, § 3, Laws of Fla. It applies to Garrett’s prosecution for a homicide committed on September 13, 2011.

Under section 776.013(3), Florida Statutes (2011), the right to stand one’s ground and meet force with force is reserved to those who are not engaged in illegal activity. In contrast, engaging in unlawful activity does not restrict the right to stand one’s ground under section 776.012(1). The two provisions operate independently. As explained in Little v. State, 111 So. 3d 214 (Fla. 2d DCA 2013), and Hill v. State, 143 So. 3d 981 (Fla. 4th DCA 2014), a person engaged in

illegal activity is entitled to stand his or her ground under section 776.012(1) without regard to section 776.013(3). The other district courts have followed Little and Hill in holding that an individual retains the section 776.021(1) right to stand his or her ground even when engaging in unlawful activity. See Garrett, 148 So. 3d at 471; Pages v. Seliman-Tapia, 134 So. 3d 536, 540 (Fla. 3d DCA 2014); Miles v. State, 162 So. 3d 169, 171 -72 (Fla. 5th DCA 2015).

A. Interdistrict Conflict

The First and Fourth DCAs have applied Little and Hill differently in assessing the effect of a flawed jury instruction presuming a duty to retreat contrary to section 776.021(1). In this case, Rios v. State, 143 So. 3d 1167 (Fla. 4th DCA 2014), and Dorsey v. State, 149 So. 3d 144 (Fla. 4th DCA 2014) (Dorsey II), trial courts erroneously instructed juries that defendants who were engaged in illegal activities when they used deadly force had a duty to retreat. The Fourth DCA decided that the instruction caused fundamental error in Dorsey II and Rios. The First DCA rejected a claim of fundamental error here, concluding that “the jury was not precluded from considering Garrett’s affirmative defense, regardless of his unlawful activity.” 148 So. 3d at 471. It based this conclusion on “ample evidence presented for the jury to find that from the beginning of the incident, Garrett did not have a reasonable belief that deadly force was necessary to prevent an imminent threat against him, especially after Ford dropped his rifle and Garrett

continued to shoot.” 148 So. 3d at 473. Dorsey and Rios show that the decision whether evidence at trial establishes that a defendant lawfully stood his ground based on fear of imminent violence belongs to a correctly instructed jury and not a court of review weighing the evidence presented to a jury incorrectly instructed on the defense of justification.

Rios killed a man and injured two others in a shooting outside a bar. Rios had an opportunity to leave after an initial confrontation and before the shooting. Although members of the group confronting Rios allegedly ordered someone to get a gun, the opinion reflects that only Rios was armed. 143 So. 3d at 1168. The trial court concluded that Rios was engaged in illegal conduct and therefore instructed the jury on the pre-2005 right of self-defense. The juries in Rios and this case received the exact same instruction on duty to retreat. See Rios, 143 So. 3d at 1167; Garrett, 148 So. 3d at 468-69. The instruction required Rios to retreat from an attack, if possible, before justifiably using deadly force.

The Fourth DCA ruled that the instruction caused fundamental error by reimposing the duty to retreat discarded in 2005, “effectively eliminat[ing] Defendant’s sole affirmative defense.” 143 So. 3d at 1170. The evidence, instructions, and closing argument by the state made it “difficult to see how the jury, during its deliberations, would not have considered Defendant’s duty to leave

with his friends” before the shooting that killed two men and injured a third. *Id.* at 1171.

Dorsey II involved a retrial after an appellate reversal with facts “nearly identical” to the first trial. 149 So. 3d at 145. The evidence in both trials showed that several young men surrounded Dorsey at a keg party. One punched Dorsey in the face. Dorsey, who was already armed, pulled out his gun and shot two of the men dead. Dorsey v. State, 74 So. 3d 521 (Fla. 1st DCA 2011) (Dorsey I). The trial court gave the exact same instruction as in this case: “that being a felon in possession of a firearm was ‘unlawful activity,’ and that if [the defendant] was engaged in unlawful activity, the jury had to consider his duty to retreat.” Dorsey II, 149 So. 3d at 146. Relying on Rios, the Fourth DCA found that the instruction constituted fundamental error requiring reversal of the two manslaughter convictions. *Id.* at 147.

The First DCA decided in this case that the error in instructing the jury on the duty to retreat had no effect on the verdict. The court concluded that under all the self-defense instructions given, the jury would have had to find that Garrett believed he faced a threat of imminent harm to acquit him. According to the First

DCA, the evidence did not support such a belief. 148 So. 3d at 472-73. The First District's holding cannot be reconciled with Rios and Dorsey II.²

In Rios, as in this case, the defendant could have avoided a threat of imminent violence by permanently leaving the scene of the confrontation before the shooting. Rios was the sole armed combatant under the facts in the Fourth DCA opinion. 143 So. 3d at 1168. Here, in Garrett's version of events, supported by discovery of a .22-caliber rifle at the shooting scene, both combatants were armed. The erroneous instruction in each case required a threat of imminent violence to justify the defendant's use of deadly force. The Fourth DCA ruled that the instruction on duty to retreat caused fundamental error and left to a correctly instructed jury the determination whether Rios faced an imminent threat of death or great bodily harm. The First DCA made this determination itself. See Garrett, 148 So. 3d at 472 (finding "ample evidence ... that from the beginning of the incident, Garrett did not have a reasonable belief that deadly force was necessary to prevent an imminent threat against him.")

Similarly, the First DCA decision clashes with Dorsey II by conditioning fundamental error on whether, in the appellate court's view, the defendant faced a

2. Rios, Garrett, and Dorsey II were all decided within a two-month period from August to October 2014. In January 2015, the Fourth DCA issued a PCA with a parenthetical citation to Garrett but no facts. Peay v. State, 154 So. 3d 1171 (Fla. 4th DCA 2015), rev. pending, No. SC15-203 (stayed pending disposition of Garrett).

threat of imminent violence sufficient to cause the jury to use the erroneous instruction to convict. As in Rios, the Fourth DCA in Dorsey left this assessment to the finder of fact. It focused instead on whether the instruction “effectively eliminated the defendant’s sole affirmative defense.” 149 So. 3d at 147 (quoting Hill, 143 So. 3d at 1170).

Here, as in Rios and Dorsey II, the instruction precluded the jury from reaching the issue of whether Garrett reasonably feared imminent violence because, as a felon in possession of a firearm, he had a duty to retreat. The prosecutor reinforced the instruction by stating in closing argument that Garrett had a duty to retreat. (R7.596) The instruction and argument negated Garrett’s section 776.012(1) right to meet deadly force with deadly force without retreating.

B. Court’s Assumption of Jury’s Role

The First DCA decision deprives Garrett of his state and federal constitutional rights to trial by jury. Cf. Garramone v. State, 636 So. 2d 869, 871 (Fla. 4th DCA 1994) (stating in decision holding that trial court erroneously denied instruction on nondeadly force that “neither the trial court nor the appellate court may usurp the function of the jury.”). The court necessarily decided that because Garrett told police that Ford “drops the gun and I still fire,” no jury would have found that Garrett was in “imminent danger” when he killed Ford as required by

section 776.012(1), “irrespective of whether he was engaged in unlawful activity at the time.” Garrett, 148 So. 3d at 473.

Whether Garrett reasonably believed his was in lethal danger when he shot Ford is not so clear that no juror would have “a reasonable doubt on question of whether the defendant was justified in the use of deadly force.” Fla. Std. J. Instr. (Crim.) 3.6(f). First, Garrett’s statement suggests he may have continued to fire as Ford dropped his gun, not after. Second, Garrett fired seven shots. (R6.371) Three bullets struck Ford. (R6.327) Garrett may have fired the remaining four shots when Ford dropped the gun or afterward. Further, these shots may not have struck Ford or been intended to strike Ford. But for the instruction that Garrett’s unlawful activity compelled him to retreat “to the wall,” the jury may have had a reasonable doubt on whether he justifiably fired the lethal shots while reasonably believing he was in danger of imminent deadly violence. This determination must be made by a jury whose deliberations are not constrained by an instruction that imposed a duty to retreat on Garrett, contrary to the controlling law at the time of his fatal confrontation with Ford.

C. Fundamental Error in Instruction on Affirmative Defense

In affirming despite the erroneous instruction, the First DCA also strayed from this Court’s test for fundamental error in jury instructions on affirmative defenses. Fundamental error occurs if an erroneous instruction deprives the

defendant of his sole or primary theory of defense and the evidence thereon is not “extremely weak.” Martinez v. State, 981 So. 2d 449, 455-56 (Fla. 2008).

Reliance on the strength of the evidence suggests that error in the instruction is not fundamental if the trial court would have been justified in omitting the instruction entirely, or perhaps if a correct instruction on the affirmative defense would not have changed the verdict. Cf. Smith v. State, 424 So. 2d 726, 732 (Fla. 1982) (finding error in denying instruction on defense of withdrawal harmless where evidence is “hardly sufficient to raise the issue”).

Here, the First DCA acknowledged that justification was Garrett’s sole defense. 148 So. 3d at 467. The court further recognized that Garrett “presented some evidence to support his claim of justifiable use of deadly force to prevent imminent death or great bodily harm or the imminent commission of a forcible felony by Ford,” and therefore was “entitled to request and receive an instruction reflecting section 776.012(1).” Id. at 471. An assessment of the strength or weakness of the evidence remained the only hurdle to fundamental error under Martinez. However, the First DCA did not conclude that the evidence of justification was “extremely weak.” Instead, it assessed whether the jury error kept the jury from finding Garrett not guilty. The court pointed to “ample evidence” that he fired when he did not face a threat of imminent death or violence that would have made retreat more dangerous. Therefore, according to the First DCA,

“[t]he erroneous instruction did not affect the jury’s ultimate responsibility to determine whether the threat faced by Garrett was imminent, in which case retreat would be futile and his use of deadly force would be justified, irrespective of whether he was engaged in unlawful activity at the time.” 148 So. 3d at 473.

The First DCA’s reasoning conflates the instructions on use of deadly force in response to a threat of imminent deadly force when the defendant is, and is not, engaged in an unlawful activity. These instructions differ. The trial court first told the jurors that deadly force was justifiable if Garrett reasonably believed he faced a threat of imminent death or great bodily harm. (R7.613-14) This portion of the instruction did not require Garrett to retreat if possible before responding to the threat with deadly force. The subsequent instruction on self-defense while engaged in an unlawful activity added another condition to his right to use force to meet a threat of imminent violence: inability to safely retreat. The jury, given both instructions, could have found that Garrett reasonably believed he faced a threat of imminent deadly harm but concluded that, instead of responding with deadly force, he could and should have safely retreated. In tandem, these instructions negated his section 776.012(1) right to stand his ground without retreating even though he was engaged in illegal activity, as permitted by the law in effect at the time of the alleged murder.

—

The First DCA erred in its unconstitutional assumption of the jury's role, its incorrect fundamental error analysis, and its flawed reasoning on the effect of the erroneous instruction. These errors led it to wrongly affirm Garrett's first-degree murder conviction despite its conclusion that the trial court erred in telling the jury he had a duty to retreat because he was engaged in illegal activity. Its decision should be quashed. Like Rios and Dorsey, Garrett is entitled to a new trial before a jury that is not told he was engaged in unlawful activity and therefore had a duty to retreat.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, Petitioner Garrett requests that this Honorable Court Petitioner approve the Fourth DCA decisions in Rios and Dorsey II, quash the First DCA decision in this case, and remand with directions to reverse Garrett's murder conviction and remand for a new trial.

CERTIFICATES OF SERVICE AND FONT SIZE

I hereby certify that a copy of the foregoing has been furnished to Trisha Meggs Pate, Office of the Attorney General at crimapptlh@myfloridalegal.com and to Mayo Correctional Institution-Annex, 8784 U.S Highway 27 West, Madison, FL 32340, this 30 day of June, 2015. I hereby certify that this brief has been prepared using Times New Roman 14 point font.

Respectfully submitted,
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ANTONIO GARRETT,

Petitioner

v.

Case No: SC14- 2110

STATE OF FLORIDA

Respondent,

_____ /

APPENDIX TO INITIAL MERIT BRIEF OF PETITIONER

Appendix

Document

A.

District Court of Appeals Opinion dated August 22, 2014

APPENDIX A

148 So.3d 466
District Court of Appeal of Florida,
First District.

Antonio GARRETT, Appellant,
v.
STATE of Florida, Appellee.

No. 1D13–1074. | Aug. 22, 2014. | Rehearing
Denied Oct. 17, 2014.

Synopsis

Background: Defendant was convicted in the Circuit Court, Duval County, Kevin A. Blazs, J., of first-degree murder and possession of a firearm by a convicted felon. Defendant appealed.

Holdings: The District Court of Appeal, Ray, J., held that:

^[1] defendant was not precluded from claiming immunity from prosecution based on “Stand Your Ground Law,” but

^[2] trial court’s improper jury instruction regarding defendant’s duty to retreat was not fundamental error.

Affirmed.

West Headnotes (6)

^[1] **Criminal Law**
🔑 Necessity of Objections in General

110Criminal Law
110XXIVReview
110XXIV(E)Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1In General
110k1030Necessity of Objections in General
110k1030(1)In general

“Fundamental error” is error that reaches down into the validity of the trial itself to

the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.

Cases that cite this headnote

^[2] **Criminal Law**
🔑 Plain or fundamental error

110Criminal Law
110XXIVReview
110XXIV(E)Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1In General
110k1038Instructions
110k1038.1Objections in General
110k1038.1(2)Plain or fundamental error

To determine whether fundamental error occurred in the court’s instruction to the jury, the District Court of Appeal must consider the effect of the erroneous instruction in the context of the other instructions given, the evidence adduced in the case, and the arguments and trial strategies of counsel.

Cases that cite this headnote

^[3] **Criminal Law**
🔑 Plain or fundamental error

110Criminal Law
110XXIVReview
110XXIV(E)Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1In General
110k1038Instructions
110k1038.1Objections in General
110k1038.1(2)Plain or fundamental error

Where the effect of a jury instruction is to negate the defendant’s only defense, it is fundamental error and highly prejudicial to the defendant.

Cases that cite this headnote

2 Cases that cite this headnote

[4]

Homicide

🔑 **Self-Defense**

203Homicide
203VIExcusable or Justifiable Homicide
203VI(B)Self-Defense
203k766In general

“Self-defense” is an affirmative defense that has the effect of legally excusing the defendant from an act that would otherwise be a criminal offense.

Cases that cite this headnote

[5]

Criminal Law

🔑 **Special pleas in bar in general**

Homicide

🔑 **Aggression or Provocation by Accused**

110Criminal Law
110XVPleas
110k286Special pleas in bar in general
203Homicide
203VIExcusable or Justifiable Homicide
203VI(B)Self-Defense
203k773Aggression or Provocation by Accused
203k774In general

Murder defendant was not precluded from claiming immunity from prosecution based on “Stand Your Ground Law,” even though he was a felon in illegal possession of a firearm when he shot and killed victim; defendant was precluded from claiming immunity under provision requiring that a person not be engaged in an unlawful activity in order to claim self-defense, but could still claim immunity under separate provision based on his claim that his use of deadly force was justified to prevent imminent death or great bodily harm or the imminent commission of a forcible felony by the victim. West’s F.S.A. § 776.012, 776.013, 776.032(1).

[6]

Criminal Law

🔑 **Elements of offense and defenses**

Homicide

🔑 **Duty to retreat or avoid danger**

110Criminal Law
110XXIVReview
110XXIV(E)Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1In General
110k1038Instructions
110k1038.1Objections in General
110k1038.1(3)Particular Instructions
110k1038.1(4)Elements of offense and defenses
203Homicide
203XIIIInstructions
203XII(E)Excuses and Justifications
203k1471Self-Defense
203k1485Duty to retreat or avoid danger

Trial court’s improper instruction to jury that defendant had a duty to retreat from confrontation with shooting victim if defendant was engaged in unlawful activity at the time of the shooting was not fundamental error in murder prosecution; instruction did not affect jury’s responsibility to determine whether the threat faced by defendant was imminent so as to justify the use of deadly force, as jury was instructed that defendant had no duty to retreat if faced with imminent death or great bodily harm, regardless of whether he was engaged in unlawful activity. West’s F.S.A. § 776.012, 776.013, 776.032(1).

3 Cases that cite this headnote

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Opinion

RAY, J.

Antonio Garrett appeals his conviction and sentence for first-degree murder and possession of a firearm by a convicted felon. His sole defense at trial was the justifiable use of deadly force in self-defense when faced with an imminent threat of death or great bodily harm. On appeal, he argues that the trial court reversibly erred by instructing the jury that possession of a firearm by a convicted felon constitutes unlawful activity because the instruction triggered an evaluation by the jury of whether Garrett had a duty to retreat, when Garrett claims no such duty existed. While we agree that the trial court improperly instructed the jury on this point, we conclude that the error did not rise to the level of fundamental error. Under the complete set of instructions given, the jury was not precluded from excusing Garrett for his deadly act if it believed that the evidence supported his claim of self-defense. We affirm Garrett's conviction and sentence.

I.

The State's theory of the case was that the victim, Jerry Ford, was sitting on the front porch of his duplex late one night, unarmed and minding his own business. Earlier the same day, during Ford's intermittent arguments with Garrett, Garrett left the premises several times and then returned, with their disagreement renewed. When Ford's girlfriend tried to reduce the tensions, Ford told her to go inside. Shortly after midnight, Garrett completely lost patience and was ready to put an end to the dispute. Holding a firearm behind his back, Garrett returned to the scene and, standing on the sidewalk outside the front gate of the residence, repeatedly fired the weapon in Ford's direction. As Ford rose from his porch chair to try to save himself, the gunshots took him to the ground. After the shooting, Garrett walked away with the gun in his hand and was heard to remark: "I told you about f—ing with me." Ford died several hours later. Garrett's identity as the shooter was not at issue. A

neighbor who witnessed the events leading up to the episode did not see anything in Ford's hands, and law enforcement found no firearm on Ford's body.

The defense's theory was that Ford and Garrett had both consumed alcohol and attended a party in a neighbor's yard earlier that day, although they were not seen at the party at the same time. Ford was sitting on his front porch for much of the day and spent some of that time talking to Garrett. Garrett became increasingly annoyed by Ford's conduct as the night fell. During a confrontation, Ford was observed softly pushing Garrett. About thirty minutes later, gunshots were heard. The evidence indicated that Garrett discharged a .45-caliber semi-automatic pistol multiple times toward Ford's porch. Defense counsel argued, however, that Garrett was not the only person armed. A rifle was found in the yard of the duplex after the shooting.

*468 After being read his rights, Garrett gave an interview to the police following the shooting. Garrett stated that Ford had kept "digging at" him and putting his hands in Garrett's face, despite Garrett's begging Ford to back off and leave him alone. Garrett admitted repeatedly leaving the scene of the bickering and walking around the corner, only to return each time.

Garrett described to the police the events that immediately preceded the firing of shots. Upon seeing Garrett return to the scene, Ford left his porch, went into his residence, grabbed a .22-caliber long rifle, and came back out with the rifle by his side. Garrett was standing on the sidewalk outside the gate. Garrett told the police that after Ford pointed his rifle at him, Garrett pulled out his own gun and fired multiple shots as Ford ran back toward the porch. As Ford was running, he was trying to cock his rifle at the same time. Garrett admitted continuing to shoot even after Ford dropped his rifle.

After his apprehension, Garrett led law enforcement to a site where he had hidden a .45-caliber semi-automatic pistol, which was operable and had two live rounds in the magazine. Four fired bullets found at the site of the shooting matched Garrett's pistol. Seven .45-caliber shell casings discovered at the site were fired from that pistol. Ford's autopsy revealed three gunshot wounds to the back side; the cause of death was

multiple gunshot wounds. Garrett did not testify at the trial, but the jury heard his redacted police interview.

The theory of self-defense was that Garrett's actions constituted justifiable use of deadly force to prevent imminent death or great bodily harm, or the imminent commission of a forcible felony: attempted second-degree murder and/or aggravated battery. The parties stipulated that Garrett had a prior felony conviction. Without an objection, the trial court gave the following written instructions regarding the justifiable use of deadly force:

An issue in this case is whether Antonio Garrett acted in self-defense. It is a defense to the offense with which Antonio Garrett is charged and all lesser included offenses if the death or injury to Jerry Ford resulted from the justifiable use of deadly force.

"Deadly force" means force likely to cause death or great bodily harm.

The use of deadly force is justifiable only if Antonio Garrett reasonably believes that the force is necessary to prevent imminent death or great bodily harm to himself while resisting another's attempt to commit Attempted Murder in the Second Degree and/or aggravated battery.

* * *

A person is justified in using deadly force if he reasonably believes that such force is necessary to prevent:

1. imminent death or great bodily harm to himself or another, or
2. the imminent commission of Attempted Murder in the Second Degree and/or Aggravated Battery, against himself or another.

In deciding whether Antonio Garrett was justified in the use of deadly force, you must judge him by the circumstances by which he was surrounded at the time the force was used. The danger facing Antonio Garrett need not have been actual; however, to justify the use of deadly force, the appearance of danger must have been so real that a reasonably cautious and prudent person under the same circumstances would have believed that the danger could be avoided

only through the use of that force. Based upon appearances, Antonio *469 Garrett must have actually believed that the danger was real.

If Antonio Garrett was not engaged in an unlawful activity and was attacked in any place where he had a right to be, he had no duty to retreat and had the right to stand his ground and meet force with force, including deadly force, if he reasonably believed that it was necessary to do so to prevent death or great bodily harm to himself or to prevent the commission of a forcible felony.

However, if you find that Antonio Garrett was engaging in unlawful activity then you must consider if Antonio Garrett had a duty to retreat.

Antonio Garrett cannot justify the use of force likely to cause death or great bodily harm unless he used every available means within his power and consistent with his own safety to avoid the danger before resorting to that force. The fact that Antonio Garrett was wrongfully attacked cannot justify his use of force likely to cause death or great bodily harm if, by retreating, he could have avoided the use of that force. However, if Antonio Garrett was placed in a position of imminent danger of death or great bodily harm and it would have increased his own danger to retreat then his use of force likely to cause death or great bodily harm was justifiable.

Over objection, the court instructed the jury that "[p]ossession of a firearm by a convicted felon constitutes unlawful activity."¹

The jury found Garrett guilty on both counts. He was sentenced to life in prison for first-degree murder, and to a concurrent fifteen-year term for possession of a firearm by a convicted felon.

II.

Garrett contends that the trial court reversibly erred by instructing the jury that "[p]ossession of a firearm by a convicted felon constitutes unlawful activity," because it required the jury to consider whether Garrett had a duty to retreat. He argues that because he established that his use of deadly force was justified to prevent the imminent commission of a forcible felony, he did not have a

duty to retreat, regardless of his unlawful possession of a firearm. In failing to raise this specific legal argument or ground at the charge conference or otherwise at trial, Garrett did not preserve it for appellate review. Occhicone v. State, 570 So.2d 902, 905–06 (Fla.1990); Bertolotti v. Dugger, 514 So.2d 1095, 1096 (Fla.1987). Accordingly, our review is for fundamental error. See § 924.051(3), Fla. Stat. (2011).

¶¶ ¶ Fundamental error is error that reaches down “into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.” Maddox v. State, 760 So.2d 89, 96 (Fla.2000). To determine whether fundamental error occurred in the court’s instruction to the jury, we must consider “the effect of the erroneous instruction in the context of the other instructions given, the evidence adduced in the case, and the arguments and trial strategies of counsel.” Smith v. State, 76 So.3d 379, 383 (Fla. 1st DCA 2011). Where “the effect of that instruction is to negate the defendant’s only defense, it is fundamental error and highly prejudicial to the defendant.” Carter v. State, 469 So.2d 194, 196 (Fla. 2d DCA 1985).

***470 A.**

¶¶ “[S]elf-defense is ... an affirmative defense that has the effect of legally excusing the defendant from an act that would otherwise be a criminal offense.” Mosansky v. State, 33 So.3d 756, 758 (Fla. 1st DCA 2010). The law governing the justifiable use of deadly force in self-defense is contained in chapter 776, Florida Statutes (2011), certain provisions of which are colloquially known as the “Stand Your Ground” law. The following two sections of the law are arguably at play:

776.012 Use of force in defense of person.—A person is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that such conduct is necessary to defend himself or herself or another against the other’s imminent use of unlawful force. However, a person is justified in the use of deadly force and *does not have a duty to retreat* if:

- (1) He or she reasonably believes that such force

is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony; *or*

- (2) Under those circumstances permitted pursuant to s. 776.013.

(Emphasis added).

Section 776.013 is titled “Home protection; use of deadly force; presumption of fear of death or great bodily harm.” Subsection (3) of this provision states:

(3) *A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony.*

(Emphasis added).

¶ Garrett argues that he established that his use of deadly force was justified under section 776.012(1) to prevent Ford’s imminent commission of a forcible felony (*i.e.*, attempted second-degree murder and/or aggravated battery against Garrett). Therefore, he submits, the court erred by instructing the jury regarding his unlawful activity because it required the jury to consider whether he had a duty to retreat in a situation where no such duty existed. Section 776.012(1) provides that a person using deadly force in circumstances in which the perceived threat of death or great bodily harm is imminent does not have a duty to retreat. While Garrett acknowledges that a “duty to retreat” analysis would be necessary under section 776.013(3) because of his unlawful activity, he contends that sections 776.012 and 776.013 provide separate and distinct bases under which the justifiable use of deadly force may be asserted, so that the “unlawful activity” preclusion in the latter is irrelevant to the operation of the former.

In support of his position, Garrett relies on Little v. State, 111 So.3d 214 (Fla. 2d DCA 2013), which held that a person is not precluded from claiming immunity from criminal prosecution under the circumstances in section 776.012, even though the person was engaged in unlawful activity at the time. Id. at 221–22. The Court reasoned that section 776.032(1), Florida Statutes (2009), provides immunity from criminal prosecution for persons using force as permitted in section 776.012 or section 776.013, and the requirements of each are not identical. Id. Because Little had established by a preponderance of the evidence that his use of force was justified to prevent imminent death or great bodily *471 harm as required in section 776.012(1), he was entitled to immunity, regardless of his status as a felon in illegal possession of a firearm. Id. at 222.

The arguments raised by State in *Little* are essentially the same as those raised in the instant case. The State maintains that the extraordinary self-defense privilege afforded by the “Stand Your Ground” law is reserved for law-abiding citizens only. It asserts that section 776.012(1) does not provide a basis for a person engaged in unlawful activity to be excused from the use of deadly force in self-defense, for such an interpretation would directly contradict the express legislative intent of section 776.012 and render the “unlawful activity” preclusion of section 776.013(3) meaningless. For the reasons expressed by the Second District Court of Appeal in *Little*, and those recently articulated in the Fourth District Court of Appeal’s *en banc* decision in Hill v. State, 143 So.3d 981, 2014 WL 3434445 (Fla. 4th DCA July 16, 2014), we reject the State’s position.

Garrett’s affirmative defense of self-defense, like Little’s claim of immunity, was based on the language in section 776.012. Because Garrett presented some evidence to support his claim of justifiable use of deadly force to prevent imminent death or great bodily harm or the imminent commission of a forcible felony by Ford, Garrett was entitled to request and receive an instruction reflecting section 776.012(1). See Smith v. State, 424 So.2d 726, 732 (Fla.1982) (“[A] defendant is entitled to have the jury instructed on the rules of law applicable to his theory of defense if there is any evidence to support such instructions.”). The fact that he was a convicted felon in unlawful possession of a firearm did not apply to the jury’s

consideration of whether Garrett had a duty to retreat under section 776.012(1).² Therefore, it was error for the trial court to instruct the jury regarding Garrett’s unlawful conduct in relation to his claim of self-defense.

B.

⁶¹ Despite the improper instruction, we do not conclude that the error reached down into the validity of the trial so as to render Garrett’s trial fundamentally unfair. When the entirety of the jury instructions relating to Garrett’s claim of self-defense are considered, the jury was not precluded from considering Garrett’s affirmative defense, regardless of his unlawful activity.

According to Garrett’s version of events, Ford was armed with a .22-caliber long rifle and had just pointed it at Garrett. Garrett pulled out his own gun and fired it in Ford’s direction as Ford ran off while trying to cock his weapon. To prevail on his claim of self-defense, Garrett needed to establish that he had a reasonable belief that his use of deadly force was necessary to prevent the imminent danger presented by Ford. While the improper instruction required the jury to consider whether Garrett had a duty to retreat, the jury was also instructed that if Garrett “was placed in a position of *imminent* danger of death or great bodily harm and it would have increased his own danger to retreat then his use of force likely to cause death or *472 great bodily harm was justifiable.” (emphasis added).

Under the complete set of instructions given, the jury could have found that Garrett’s use of deadly force was justified and he had no duty to retreat because retreating would be futile given the “imminence” of the danger he faced. Although the challenged sentence in the instruction raised a “duty to retreat” question, in considering the effect of the instruction in the context of the other instructions given, along with the evidence adduced in the case, we find that the jury was sufficiently instructed on Garrett’s theory of self-defense. There was ample evidence presented for the jury to find that from the beginning of the incident, Garrett did not have a reasonable belief that deadly force was necessary to prevent an imminent threat against him, especially after Ford dropped his rifle and Garrett continued to shoot.

That the jury ultimately rejected Garrett’s claim of self-defense does not mean that the challenged instruction constituted fundamental error.

Our reasoning is consistent with the analysis and holding in *Hardison v. State*, 138 So.3d 1130 (Fla. 1st DCA 2014). Hardison appealed a conviction and sentence for second-degree murder, asserting it was fundamental error to give the standard instruction on the justifiable use of deadly force. Specifically, he contended that the instruction was inconsistent with applicable law, in that it effectively made the defense available only to persons not engaged in unlawful activity. Like Garrett, Hardison was a convicted felon in possession of a firearm at the time of the incident. *Id.* And as in the instant case, the trial court in *Hardison* instructed the jury on justifiable use of deadly force, using the standard instruction that tracks [section 776.012](#), combined with instructions relating to [section 776.013](#): “[i]f the defendant was not engaged in an unlawful activity and was attacked in any place where he had a right to be, he had no duty to retreat and had the right to stand his ground,” and “[p]ossession of a firearm by a convicted felon is an unlawful activity.” *Id.* at 1131–32.

At Hardison’s request, however, the judge also instructed the jury that “in certain circumstances, a convicted felon may lawfully possess a firearm.” One of those circumstances exists when the felon was in “present, imminent and impending peril of death or serious bodily injury, or reasonably believed himself or others to be in such danger.” *Id.* In concluding that no fundamental error occurred in *Hardison*, we determined that this additional instruction kept the jury from assessing Hardison’s defense based solely on his unlawful possession of a firearm. *Id.* at 1135.

[W]hen we consider the complete instruction on justifiable use of deadly force given in this case, we

find the jury was sufficiently instructed that, absent a reasonable belief he was under threat of imminent death or great bodily harm, or imminent commission of a forcible felony, Hardison’s use of deadly force in self-defense was not justified. The evidence put before the jury could support a finding that, Hardison’s belief that the threat was imminent was unreasonable, whether or not he was engaged in unlawful activity.

Id. (emphasis in original).

Similarly, when viewing the jury instructions in the instant case as a whole, Garrett’s claim of self-defense turned on whether the evidence before the jury supported a reasonable belief that Garrett was under threat of imminent death or great bodily harm or the imminent commission of a forcible felony by Ford. The erroneous instruction did not affect the jury’s ultimate responsibility to determine *473 whether the threat faced by Garrett was *imminent*, in which case retreat would be futile and his use of deadly force would be justified, irrespective of whether he was engaged in unlawful activity at the time. Finding no fundamental error, we affirm the conviction and sentence.

CLARK and WETHERELL, JJ., concur.

Parallel Citations

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Footnotes

¹ During the charge conference, defense counsel asked that this sentence, which the State requested based on *Dorsey v. State*, 74 So.3d 521 (Fla. 4th DCA 2011), not be read. When asked for the legal basis for the objection, defense counsel stated that the case doesn’t require that the challenged language be included in the jury instruction.

² We note that [section 776.012, Florida Statutes \(2011\)](#), has since been amended to include the “unlawful activity” preclusion contained in 776.013(3). The relevant portion of [section 776.012](#) now reads: “[A]

person who uses or threatens to use deadly force in accordance with this subsection does not have a duty to retreat and has the right to stand his or her *ground if the person using or threatening to use the deadly force is not engaged in a criminal activity* and is in a place where he or she has a right to be.” (emphasis added). Ch. 2014–195, § 3, Laws of Fla. (effective date June 20, 2014).